

A Public Prosecutor v Nomezam Apandy bin Abu Hasan

HIGH COURT (MELAKA) — CRIMINAL TRIAL NO 45-05 OF 2003
LOW HOP BING J
3 FEBRUARY 2005

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Criminal Procedure — Interpreter — Confession made to magistrate through interpreter — No objections by accused to interpreter — Entire interpreted confession read back to accused — Accused having nothing to add — Whether possible for accused to have confused interpreter for police officer

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Criminal Procedure — Trial — Confession to magistrate — Whether confession voluntarily made

Evidence — Confession — Admissible confession — Whether confession vitiated by inducement, threat or promise

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Evidence — Confession — Made to magistrate through interpreter — Magistrate failing to make memorandum required under s 115(iii) of Criminal Procedure Code — Magistrate called to give evidence as to voluntary nature of confession — Whether absence of memorandum would render confession inadmissible

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Evidence — Confession — Voluntariness — Burden and standard of proof — Whether defence obliged to prove involuntariness

Evidence — Confession — Voluntariness — Whether voluntariness of confession vitiated by inducement, threat or promise

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The accused was charged with murder under s 302 of the Penal Code. At his trial, the prosecution sought to admit his confession ('ID26') as evidence. Defence counsel objected and a trial-within-a-trial ('TWT') was held to determine whether the accused made ID26 voluntarily, without inducement, threat or promise. At the end of the TWT, the High Court's finding of facts

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revealed the following. On 1 July 2003, the accused was brought handcuffed by a police corporal to the chambers of lady magistrate TW1. At TW1's instructions, the corporal unlocked the handcuffs, left and waited outside the chambers. TW1 examined the accused, found traces of 'kudis' (scabies), but no traces of injury. A lady interpreter (TW3) was present with the magistrate in the chambers. The magistrate asked the accused if he wanted a male magistrate

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with a male interpreter in attendance to record his confession. The accused replied it did not matter. In response to inquiries by TW1, the accused said that he had been in police custody for about one week. He was given enough food and beverage and was treated well. The police, he said, did not assault him. The accused told TW1 he was making his confession voluntarily and that there was

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no inducement, threat or promise. TW1 took 40 minutes to record ID26. The reverse of one of the A4-sized papers used to record ID26 had been left blank. ID26 contained the caution under s 113 of the CPC. It did not however contain

the memorandum under s 115(iii) of the CPC. The police investigating officer (TW5) testified that the accused had on 25 June 2003 indicated his intention to give his confession. The accused was however brought to TW1 to record the confession on 1 July 2003, as TW5 wanted to give the accused the opportunity to reflect on his intention. TW5's evidence also revealed that the accused had told TW5 that he was healthy and was well treated while in remand. Neither TW5 nor the accused could tell the court how many times the accused had been taken out of the lock-up, as the prosecution had not produced the lock-up diary and other relevant documentation. In objecting to the admissibility of ID26, defence counsel submitted the following: (i) TW3 (the interpreter) had confused the accused who thought the interpreter was a police officer; (ii) TW1's physical examination of the accused was incomplete and unsatisfactory; (iii) TW1 failed to analyse the accused's mental state before recording his confession; (iv) TW1 failed to inform the accused of the charge against him; (v) TW1 failed to record the caution under s 113 the CPC as required under s 115(ii) thereof; (vi) the reverse of one of the pages in ID26 was left blank and that the accused had actually signed on one page only; (vii) TW1 had not made the memorandum required under s 115(iii) of the CPC; (viii) that the adverse inference under s 114 illus (g) should be raised against the prosecution for failure to: (a) produce the lock-up diary and application forms to move the accused from the lock-up; (b) call certain police officers who apparently knew of the accused's movements in and out of the police lock-up. Defence counsel also raised various allegations in support of his argument that inducements, threats, or promises affected the voluntariness of the accused's confession.

Held, finding that ID26 had been made without any inducement, threat, or promise:

- (1) For the purposes of determining the admissibility of a confession made by an accused person, the burden is on the prosecution to prove that the accused made it voluntarily, without any inducement, threat or promise. The standard to be discharged is beyond all reasonable doubt. It is not for the defence to prove involuntariness (see para 22).
- (2) The presence of TW3 (the interpreter) had been expressly stated in ID26 by TW1 (the magistrate). She had asked the accused if he wanted to have a male as opposed to a lady interpreter to interpret for him. He replied that it did not matter. The High Court therefore found that TW3's capacity had been expressly made known to the accused by TW1 in chambers. TW1 also read over the entire confession that had been interpreted by TW3 to the accused. He was asked if he had anything to add, to which he replied in the negative. The High Court was thus unable to accept the defence contention that the accused had thought and was confused that TW3 was a police officer (see para 27).

- A** (3) Upon a proper perusal of the inquiry conducted and recorded by TW1 in ID26 and an evaluation of her oral testimony, the High Court would accept her testimony. Thus, she did inform the accused of the charge and she had administered the caution under s 113 of the CPC, which was also expressly stated in ID26. TW1 had also recorded the extensive inquiry in relation to the accused's reason for making the confession (see paras 36, 37 and 40).
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- (4) The High Court was unable to identify any submission by the defence in relation to any irregularity, inaccuracy or incorrectness in the recording of the confession. The High Court perused ID26 and found
- C** nothing to suggest that the content of ID26 had been irregularly, inaccurately or incorrectly recorded by TW1. Thus, there was no merit in the defence's contention that the reverse of one of the pages in ID26 was left blank and that the accused had actually signed on one page only (see para 41).
- D** (5) Although TW1 had not made the memorandum as required under s 115(iii) of the CPC, in the instant case, TW1 had been called as a witness and testified that the accused voluntarily made the confession. Thus, s 115(iii) of the CPC had been duly complied with (see para 50).
- E** (6) On the facts, there was no withholding or suppression of the lock-up diary. In any event, the defence was at liberty to apply to the court to subpoena the relevant police officers or the person having custody of the lock-up diary and the application forms to give evidence for the defence. The defence however had elected not to do so. In such circumstances, s 114 illus (g) did not apply. No adverse inference should be drawn against the prosecution (see para 59).
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- (7) The High Court, having anxiously considered the evidence adduced for the prosecution and the defence, was of the view that the prosecution had proved beyond reasonable doubt that the confession in ID26 had
- G** been made by the accused voluntarily, without any inducement, threat or promise. Thus it was admitted as a prosecution exhibit (see para 74).

[Bahasa Malaysia summary]

- H** Tertuduh telah dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan. Semasa perbicaraan, pihak pendakwa memohon agar pengakuan tertuduh ('ID26') diterima masuk sebagai bukti. Peguambela tertuduh membuat bantahan dan hakim telah mengadakan perbicaraan dalam perbicaraan untuk memutuskan sama ada tertuduh membuat ID26 secara rela hati, dengan tiada pendorongan, ugutan atau perjanjian tersembunyi. Di penghujung perbicaraan dalam perbicaraan, penemuan-penemuan fakta oleh Mahkamah Tinggi mendedahkan yang berikut. Pada 1 Julai 2003, tertuduh
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dibawa bergari ke kamar majistret wanita TW1 oleh seorang polis berpangkat koperal. Atas suruhan TW1, koperal tersebut membuka gari tertuduh dan keluar menunggu di luar kamar. TW1 memeriksa tertuduh dan mendapati kesan kudis tetapi tiada kesan kecederaan. Seorang jurubahasa wanita (TW3) turut berada di dalam kamar tersebut bersama majistret. Majistret bertanya kepada tertuduh sama ada tertuduh mahukan majistret lelaki serta jurubahasa lelaki untuk hadir dan merekod pengakuannya. Tertuduh berkata tiada perbezaan. Dalam menjawab pertanyaan TW1, tertuduh menyatakan bahawa dia telah berada di bawah tahanan polis selama seminggu. Tertuduh juga menyatakan bahawa dia diberi makanan dan minuman yang mencukupi serta dijaga dengan baik. Tertuduh berkata bahawa polis tidak mencederakannya. Tertuduh juga memberitahu TW1 bahawa dia membuat pengakuannya secara rela hati dengan tiada pendorongan, ugutan atau perjanjian tersembunyi. TW1 mengambil 40 minit untuk merekodkan ID26. Satu sebelah muka surat bersaiz A4 telah digunakan untuk merekodkan ID26 manakala sebelah yang lain ditinggalkan kosong. ID26 mengandungi amaran di bawah s 113 Kanun Acara Jenayah. Namun, ID26 tidak mengandungi memorandum di bawah s 115(iii) Kanun Prosedur Jenayah. Pegawai penyiasat polis (TW5) memberi keterangan bahawa tertuduh telah pada 25 Jun 2003 menunjukkan keinginannya untuk memberi pengakuannya. Tertuduh telah hanya dibawa ke hadapan TW1 untuk merekodkan pengakuannya pada 1 Julai 2003 kerana TW5 ingin memberi tertuduh masa untuk berfikir semula tentang keinginannya untuk memberi pengakuan. Keterangan TW5 juga menunjukkan bahawa tertuduh telah memberitahu TW5 yang dia berada di dalam keadaan sihat serta dijaga dengan baik semasa dalam tahanan reman. TW5 dan tertuduh tidak dapat memberitahu mahkamah berapa kali tertuduh telah dikeluarkan dari tahanan kerana pihak pendakwaan tidak mengemukakan diari tahanan serta dokumen-dokumen lain yang berkaitan. Dalam membantah penerimaan masuk ID 26, peguam bela tertuduh menyatakan yang berikut: (i) TW3 (jurubahasa) telah mengelirukan tertuduh yang berpendapat bahawa jurubahasa tersebut merupakan pegawai polis; (ii) pemeriksaan fizikal TW1 ke atas tertuduh tidak lengkap dan tidak sempurna; (iii) TW1 gagal menganalisis keadaan mental tertuduh sebelum merekodkan pengakuannya; (iv) TW1 telah gagal memberitahu tertuduh mengenai dakwaan terhadapnya; (v) TW1 gagal merekodkan amaran menurut s 113 Kanun Prosedur Jenayah; (vi) Satu sebelah muka surat ID26 ditinggalkan kosong dan tertuduh hanya menurunkan tandatangannya di atas satu sebelah muka surat sahaja; (vii) TW1 tidak membuat memorandum yang diperlukan menurut s 115(iii) Kanun Prosedur Jenayah; (viii) bahawa andaian bertentangan di bawah s 114(g) Akta Keterangan 1950 perlu dibangkitkan terhadap pihak pendakwa kerana gagal: (a) mengemukakan diari tahanan dan borang permohonan untuk mengalihkan tertuduh dari tahanan; (b) memanggil beberapa pegawai polis yang mempunyai pengetahuan tentang pergerakan tertuduh keluar dan masuk dari tahanan. Peguambela tertuduh

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A juga membangkitkan beberapa dakwaan yang menyokong hujahannya bahawa pendorongan, ugutan atau perjanjian tersembunyi menjejaskan kerelaan pengakuan tertuduh.

B **Diputuskan**, mendapati bahawa ID26 telah dibuat tanpa pendorongan, ugutan atau perjanjian tersembunyi:

C (1) Bagi tujuan menentukan penerimaan masuk pengakuan yang dibuat oleh seorang tertuduh, beban adalah di atas pihak pendakwa untuk membuktikan bahawa tertuduh membuat pengakuan tersebut secara rela hati, tanpa apa-apa dorongan, ugutan atau perjanjian tersembunyi. Beban bukti di atas pihak pendakwa adalah di tahap melampaui segala keraguan munasabah (lihat perenggan 22).

D (2) Kehadiran TW3 (jurubahasa) telah dinyatakan dengan nyata di dalam ID26 oleh TW1 (majistret). Majistret telah bertanya kepada tertuduh sama ada tertuduh mahukan jurubahasa lelaki. Tertuduh menjawab tiada perbezaan. Mahkamah Tinggi oleh itu mendapati bahawa fungsi TW3 telah dinyatakan dengan nyata kepada tertuduh di dalam kamar. TW1 juga membaca secara keseluruhan pengakuan yang telah diterjemahkan oleh TW3 kepada tertuduh. Tertuduh kemudian ditanya sama ada dia mempunyai apa-apa lagi untuk ditambah dan dia menjawab tidak. Oleh itu, Mahkamah Tinggi tidak boleh menerima hujahan pembelaan bahawa tertuduh keliru dan berpendapat bahawa jurubahasa tersebut merupakan pegawai polis (lihat perenggan 27).

F (3) Selepas penelitian terperinci ke atas penyelidikan yang dikendalikan dan direkodkan oleh TW1 di dalam ID26 dan penilaian ke atas keterangan lisannya, Mahkamah Tinggi telah menerima keterangannya. TW1 telah memberitahu tertuduh tentang dakwaan terhadapnya dan dia juga telah memberi tertuduh amaran menurut s 113 Kanun Prosedur Jenayah, yang juga telah dinyatakan secara nyata di dalam ID26. TW1 telah juga merekodkan secara keseluruhan penilaian terperinci berkaitan dengan sebab-sebab tertuduh memberi pengakuan (lihat perenggan 36, 37 dan 40).

H (4) Mahkamah Tinggi tidak boleh mengenal pasti apa-apa hujahan dari pembelaan berkaitan dengan ketidaksempurnaan dalam merekodkan pengakuan tersebut. Mahkamah Tinggi telah meneliti ID26 dan tidak mendapati sebarang ketidaksempurnaan. Oleh itu, tidak ada apa-apa merit di dalam hujahan pembelaan bahawa satu sebelah muka surat ID26 telah ditinggalkan kosong dan tertuduh hanya menurunkan tandatangan pada satu sebelah muka surat sahaja (lihat perenggan 41).

I (5) Walaupun TW1 tidak membuat memorandum seperti yang dikehendaki oleh s 115(iii) Kanun Prosedur Jenayah, di dalam kes ini, TW1 telah dipanggil sebagai saksi dan memberi keterangan bahawa tertuduh telah

- memberi pengakuan secara rela hati. Oleh itu, s 115(iii) Kanun Prosedur Jenayah telah dipatuhi (lihat perenggan 50). **A**
- (6) Berdasarkan fakta-fakta di dalam kes ini, tidak ada apa-apa tindakan menyekat atau menyembunyikan dairi tahanan. Malahan, pihak pembelaan boleh memohon kepada mahkamah untuk mengeluarkan sepina terhadap mana-mana pegawai polis yang mempunyai diari tahanan tersebut dan borang permohonan untuk memberi keterangan bagi pihak pembelaan. Pihak pembelaan tidak berbuat demikian. Dalam keadaan tersebut, s 114 Akta Keterangan 1950 tidak mempunyai aplikasi. Tiada andaian bertentangan yang boleh dibuat terhadap pihak pendakwa (lihat perenggan 59). **B**
- (7) Setelah Mahkamah Tinggi meneliti bukti-bukti yang dikemukakan oleh kedua-dua pihak, mahkamah berpendapat bahawa pihak pendakwa telah membuktikan melampaui segala keraguan munasabah bahawa pengakuan di dalam ID26 telah dibuat oleh tertuduh secara rela hati, tanpa pendorongan, ugutan atau perjanjian tersembunyi. Oleh itu, ID26 diterima masuk sebagai eksibit pihak pendakwa (lihat perenggan 74).] **C**
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Notes

- For a case on confession made to magistrate through interpreter, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2020. **E**
- For cases on confession made to magistrate in a trial, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4358–4359.
- For cases on confession to a magistrate, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3329–3330.
- For cases on voluntariness of confession, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 746–785. **F**
- For voluntariness of confessions see 12 *Halsbury's Laws of Malaysia* para [210.105].

Cases referred to

- Chean Siong Guat v PP* [1969] 2 MLJ 63 (refd) **G**
- Ibrahim v The King* [1914] AC 599 (refd)
- Kesavan Sendaran v PP* [1998] 1 MLJU 375 (refd)
- Munusamy v PP* [1987] 1 MLJ 492 (refd)
- PP v Chong Boo See* [1988] 3 MLJ 292 (refd) **H**
- PP v Datuk Haji Harun bin Haji Idris No 2* [1977] 1 MLJ 15 (refd)
- PP v Lee Chee Meng & Anor* [1991] 1 MLJ 226 (refd)
- PP v Mohamed Kasim Mahmood* [1991] 2 CLJ 99 (refd)
- PP v Raman I Raman II Ayappan* [1940] MLJ 163 (refd)
- PP v Law Say Seek & Ors* [1971] 1 MLJ 199 (refd)
- S Govindasamy v PP* [1949] MLJ 101 (refd) **I**
- Selvadurai v PP* [1948] 1 MLJ 43 (refd)
- Tan Too Kia v PP* [1980] 2 MLJ 187 (refd)

- A** *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 (refd)
Yaacob v PP [1966] 1 MLJ 67 (refd)

Legislation referred to

- B** Criminal Procedure Code ss 113, 115, (ii), (iii), 117, 119(i)(d), (ii)
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Evidence Act 1950 ss 24, 26, 114(g)
Federal Constituion art 5(3)
Penal Code s 302

- C** *V Aravindbaksbin (Palani Aishab & Co) for the defendant.*
Abdul Rashid bin Hj Daud (Deputy Public Prosecutor) for the prosecution.

Low Hop Bing J:

D I INTRODUCTION

[1] In the midst of the trial in which the accused is facing a charge under s 302 of the Penal Code, the prosecution sought to tender the accused's confession ID26 as an exhibit. As the defence has objected to its admissibility, I proceeded to conduct a trial within a trial (*voire dire*) in order to determine whether the accused has made ID26 voluntarily, without inducement, threat or promise.

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II FINDING OF FACTS

- F** **[2]** After hearing the evidence adduced for the prosecution and the defence respectively, at the end of the trial within the trial, I now narrate my finding of facts.

- G** **[3]** On 1 July 2003, at about 3.19pm, the accused who was handcuffed was brought by corporal No 82144 to the chambers of the lady magistrate TW1 who then instructed the corporal to relieve the accused of the handcuff, which the corporal did. Subsequently the corporal left and waited outside the chambers.

- H** **[4]** A lady interpreter TW3 was with the magistrate in the chambers. At that time, the magistrate was at her seat when she examined the accused about 15 feet away and found some traces of 'kudis' (scabies), but no traces of any injury.

- I** **[5]** The magistrate asked the accused if he wanted a male magistrate with a male interpreter in attendance to record his confession, to which the accused had replied that it did not matter.

[6] In response to the inquiry by the magistrate, the accused said that he had been in police custody for about one week, during which he was given

enough food and beverage and was treated well as the police did not assault him. The accused said he knew the reason he had come to the court ie to make his confession voluntarily and that there was no inducement, threat or promise.

[7] Before recording ID26, the magistrate did conduct an extensive inquiry in order to ascertain the reason why the accused wanted to make the confession. The magistrate also testified that she had told the accused that the charge against the accused under s 302 of the Penal Code would carry the death penalty upon conviction, to which the accused added that he still wanted to make the confession although he had the liberty to refuse to do so.

[8] The magistrate took about 40 minutes and completed the recording of ID26 at 4.01pm. The reverse of one of the A4-size papers used to record ID26 had been left blank.

[9] ID26 contained the caution under s 113 of the Criminal Procedure Code. There was no memorandum under s 115(iii) of the same Code.

[10] According to TW5 ASP Azman bin Razak who was the investigating officer TW5, the accused had during remand been taken in and out of the lock-up in the Melaka Tengah Police district headquarters four to five times, but he did not know whether the accused was brought to a dark room before being taken to TW5's room. TW5 also testified that the accused had on 25 June 2003 indicated his intention to give his confession but was brought to the magistrate to record the confession on 1 July 2003, as TW5 wanted to give the accused the opportunity to reflect on such intention. The accused's intention was not recorded by TW5 in the diary of proceedings in investigation.

[11] TW5's evidence revealed that the accused had told TW5 that the accused was healthy and was well treated while in remand. Neither TW5 nor the accused could tell the court how many times the accused had been taken out of the lock-up, as the prosecution had not produced the lock-up diary and application form. Although the deceased died at 9am on 27 June 2003, TW5 informed the accused of this some 30 hours later ie on 28 June 2003 at 4pm.

[12] As the accused had wanted to give the confession, TW5 told the accused to do so to a magistrate.

[13] On the other hand, the accused testified that he made the confession out of fear of being assaulted by the police and that TW5 could procure a release for him, as TW5 had helped the accused in a previous case of motor cycle theft. The accused added that whenever he was brought to TW5's office, he was given special treatment in the form of nasi lemak with tea, chicken briyani rice with iced tea, cigarettes and television viewing for the purpose of giving the confession, as both the accused and TW5 were allegedly friends and TW5 had allegedly taken advantage of such friendship to obtain the confession.

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- A** [14] The accused also testified that he had been well treated and was given sufficient food and beverage three times, in addition to another drink in the evening.
- B** [15] Both TW2 corporal Anuar bin Hj Ibrahim and TW4, lance corporal Roslan bin Mohamad testified that TW4 took the accused from and to the police lock-up, but TW4 was unable to say if the accused's movements were recorded in the lock-up diary or his own note book.
- C** [16] TW6R chief inspector Izzuddin bin Runggai, the prosecution's rebuttal witness is the officer who arrested the accused at 3.40am on 24 June 2003. TW6R had specifically denied the allegation by the accused that while on remand he was assaulted by TW6R and other unidentified police personnel by means of lighted cigarette butts to burn the accused's rear left shoulder.
- D** [17] I shall deal with the question of credibility and truthfulness of the prosecution witnesses and of the accused later in my judgment.

III RELEVANT STATUTORY PROVISIONS GOVERNING CONFESSION

- E** [18] Our Evidence Act 1950 ('the Act') and the Criminal Procedure Code (CPC) contain provisions governing the admissibility of a confession made by an accused person.
- F** [19] As a general rule, under s 24 of the Act, such a confession is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.
- G** [20] Section 26 of the Act provides that, subject to any provision contained in any written law, no confession made by any person while in the custody of a police officer, unless it is made in the immediate presence of eg a magistrate, shall be proved as against that person.
- H** [21] Section 115 of the CPC provides for the procedural mechanism and the mode of recording such a confession.

IV BURDEN OF PROOF

- I** [22] For the purposes of determining the admissibility of a confession made by an accused person, the burden is on the prosecution to prove that the accused has made it voluntarily, without any inducement, threat or

promise and the standard to be discharged is beyond all reasonable doubt, and it is not for the defence to prove involuntariness: see *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292 (HC) per Edgar Joseph Jr J (later FCJ) at p 297G, following *Ibrahim v The King* [1914] AC 599.

[23] In *Yaacob v Public Prosecutor* [1966] 1 MLJ 67, Thomson LP (as he then was) in delivering judgment of the Federal Court held, *inter alia*, at p 68C–D that the decision as to whether a statement such as a confession is free and voluntary is a question of fact and that question must be decided, like any other question of fact, on evidence.

V INTERPRETER TW3 IN ATTENDANCE

[24] It was submitted by learned defence counsel Mr V Aravindhakshin that the presence of interpreter TW3 has confused the accused who thought the interpreter was a police officer as the magistrate did not inform the accused of TW5's capacity as interpreter. He relied on s 24 of the Evidence Act 1950; *Public Prosecutor v Law Say Seek & Ors* [1971] 1 MLJ 199; and *Selvadurai v Public Prosecutor* [1948] 1 MLJ 43.

[25] Learned deputy public prosecutor En Abdul Rashid bin Hj Daud responded that there was no confusion of TW5's capacity as interpreter.

[26] I have adverted to s 24 of the Act above and its legal implications which in my view are not supportive of the defence contention. I am unable to see how the presence of the interpreter would or could affect the voluntariness of the confession or cause confusion to the accused.

[27] The presence of the interpreter had been expressly stated in ID26 by the magistrate who had asked the accused if the accused would like to have a male as opposed to a lady interpreter to interpret for the accused, to which the accused had replied that said it did not matter. It is my finding that TW3's capacity has been expressly made known to the accused by the magistrate in chambers. The magistrate had also read over the entire confession and that was interpreted by TW3 to the accused who was asked if he had anything to add, to which he replied in the negative. I am therefore unable to accept the defence contention that the accused had thought and was confused that the interpreter was a police officer.

[28] In *PP v Law Say Seek*, two accused persons had made a confession each. Sharma J (as he then was) had reason to apprehend that the influence of the police was still on the mind of the accused who had no desire of their own to be produced before the magistrate, as both the accused had remained at the 'special branch' lock-up and that the words 'special branch' had quite different connotations from the ordinary police. The second accused had broken down while the first accused's desire to tell the truth was not in connection with the offence alleged before the learned judge but was one

- A** under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 which kept the fear in their minds alive, the fear that they had been detained and were going to be kept under an Emergency Ordinance. The first accused said that he was assaulted and was taken to hospital where he narrated the story of the assault to a doctor. On these facts, the learned judge
- B** had some doubts as to the voluntary nature of the confessions which were held to be inadmissible. The facts there were clearly different from those which I have unfolded in the above narrative.

- [29]** The facts in *Sehbadurai*, do not touch on the recording of a confession under s 115 of the CPC, although an inculpatory statement was made to an
- C** estate manager. In the circumstances, I am unable to see how it could support the defence contention.

VI EXAMINATION OF ACCUSED

- D** **[30]** It was argued for the accused that the physical examination of the accused by the magistrate was incomplete and unsatisfactory for the purpose of ascertaining the injuries allegedly sustained by the accused, and that the magistrate had failed to analyse the accused's mental state before recording the confession. *Law Say Seek*; and *Public Prosecutor v Lee Chee Meng & Anor* [1991] 1 MLJ 226 were cited in support.
- E** **[31]** The prosecution contended that the accused had testified that the police had not raised their hands to assault him and that he was well treated in the lock-up, while the accused's allegations of assault had been rebutted by the prosecution, in accordance with *Tan Too Kia v Public Prosecutor* [1980] 2 MLJ 187 (PC).
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[32] I have referred to the relevant facts in *Law Say Seek*, which are different from those in the instant case and concluded that it did not support the defence contention.

- G** **[33]** In *Lee Chee Meng*, a cautioned statement was recorded from the first accused who 'was subjected to threats and beatings by police personnel'. James Foong JC (now J) ruled that the cautioned statement was inadmissible.

- H** **[34]** The facts before me do not show any similarity with those in *Lee Chee Meng*, especially where there is rebuttal evidence by the prosecution witness TW6R to negate the alleged assault, in line with the Federal Court judgment delivered by Suffian LP (as he then was) in *Tan Too Kia*.

VII WAS THE ACCUSED INFORMED OF THE CHARGE?

- I** **[35]** It was canvassed for the accused that the magistrate had failed to inform the accused of the charge against the accused and had also failed to record the caution under s 113 the CPC as required under s 115(ii) thereof.

[36] The response of the prosecution is that the magistrate did state in ID26 and also testified in court that she had informed the accused of the charge under s 302 of the Penal Code and the consequence upon conviction ie death penalty and that she had administered the caution under s 113 of the CPC.

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[37] Upon a proper perusal of the inquiry conducted and recorded by the magistrate in ID26 and an evaluation of her oral testimony, I accept her testimony that she did inform the accused of the charge and that she had administered the caution under s 113 which was also expressly stated in ID26.

B

[38] Section 115(ii) of the CPC relied on by the defence, where relevant, merits reproduction as follows :

C

Such *confession* shall be recorded in full in writing by the magistrate to whom it is made... (Emphasis added.)

[39] In my view, s 115(ii) imposes a mandatory requirement for the magistrate to record the *confession* in full in writing. The content of the confession is not immediately relevant at this stage of the trial within a trial.

D

[40] Be that as it may, the magistrate did record the extensive inquiry in relation to the accused's reason, *inter alia*, of making the confession.

E

VIII ACCUSED SIGNED ONE PAGE ONLY

[41] It was stressed for the accused that the reverse of one of the pages in ID26 was left blank and that the accused had actually signed on one page only.

F

[42] In my view, the question to be addressed is whether there was any irregularity, inaccuracy or incorrectness in the recording of the confession. I am unable to identify any submission by the defence in relation to any irregularity etc. I have perused ID26 and can find nothing to suggest that the content of ID26 had been irregularly, inaccurately or incorrectly recorded by the magistrate. I therefore do not see any merit in this contention.

G

IX MEMORANDUM UNDER SECTION 115(iii) CPC

[43] The defence contention is that the magistrate had not made the memorandum as required in s 115(iii) of the CPC.

H

[44] The prosecution submitted that the omission to make the memorandum did not render ID26 inadmissible, as the magistrate had orally testified that the accused had made the confession voluntarily.

[45] Section 115(iii) where relevant reads :

I

No magistrate shall record any confession unless upon questioning the person making it he has reason to believe that it was made voluntarily, and when he

- A** records any confession he shall make a memorandum at the foot of such record to the following effect:

I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct and it contains a full and true account of what he said.

- B**
(Signed) AB
Magistrate

- C** [46] Section 115(iii) was considered in *Mohamed Isa Leman* where the magistrate recorded the accused's confession at the Rest House and, presumably having had no access to books, had overlooked the form of memorandum. In excluding the confession, Roger Hall CJ delivered judgment for the Court of Criminal Appeal and held, *inter alia*, that the magistrate could have been called at the trial to prove that he believed the confession was voluntarily made.

- D** [47] In *Public Prosecutor v Raman I Raman II Ayappan* [1940] MLJ 163, another Court of Criminal Appeal also considered s 115(iii) and held that where the memorandum had been omitted, evidence could be taken that the confession was in fact voluntarily made i.e. duly made.

- E** [48] The aforesaid two judgments of the Court of Criminal Appeal have consistently established that notwithstanding the omission by the recording magistrate in including the memorandum as required in s 115(iii), that omission is capable of being remedied by calling the magistrate to testify that the confession had been voluntarily made.

- F** [49] Abdul Aziz Mohamad J in *Public Prosecutor v Mohamed Kasim Mahmood* [1991] 2 CLJ 99 at p 113 held, *inter alia*, that the word 'voluntarily' has a wide meaning.

- G** [50] In the instant case, the recording magistrate had been called as a witness and testified that the accused had voluntarily made the confession. In the light of the said judgments of the Court of Criminal Appeal, I am of the view that s 115(iii) has been duly complied with.

- H** [51] *S Govindasamy v Public Prosecutor* [1949] MLJ 101, relied on by the defence, does not concern the legal effect of s 115(iii) and so can throw no light in this respect.

X SECTION 114(G) EVIDENCE ACT 1950

- I** [52] Section 114(g) was raised for the defence in relation to the failure by the prosecution :

- (1) to produce the lock-up diary and application forms to move the accused from the lock-up;

- (2) to call SP3 Amran bin Daud who was together with the accused in the same car from the lock-up to the magistrate's court at about 2pm on 1 July 2003; and
- (3) to call lance corporal Hassan who knew of the movement of the accused in and out of the lock-up.

A**B**

[53] The stand taken for the prosecution was that s 114(g) would only apply if there is a withholding or suppression of evidence, citing *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC).

[54] The importance of s 114(g) would merit reproduction as follows:

C

114 Court may presume existence of certain fact.

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

D

ILLUSTRATIONS

The court may presume:

- (g) that evidence which could be and is not produced would if produced be unfavourable to the person who *withholds* it. (Emphasis added.)

E

[55] In order to comprehend the legal implications of s 114(g), it is essential for me to focus on the nature and purpose of the trial within the trial before me ie to determine the voluntariness of the accused's confession. In this respect, the burden of proof cast on the prosecution does not include discharging the function of the defence: *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC).

F

[56] The Supreme Court in *Ti Chuee Hiang* explained that:

G

- (1) it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not: *Teb Lee Tong v Public Prosecutor* [1956] MLJ 194.
- (2) the exercise of the prosecutorial discretion is to call only such witnesses as it requires to establish its case and that:

H

That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 Act p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 at p 49, applied in *R v Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

I

A The abovestated principles have been applied by Abdul Wahab Patail J in *Kesavan Senderan v Public Prosecutor* [1998] 1 MLJU 375 who at p 350c added that s 114(g) does not mean that the prosecution must obtain witnesses and offer them for the defence.

B [57] In *Munusamy* the Supreme Court also enunciated that an adverse presumption or inference under s 114(g) can only be drawn if there is a withholding or suppression of evidence and not merely on account of a failure to obtain evidence.

C [58] Before me, TW5 the investigating officer testified that the accused had been taken out of the lock-up on 25 June 2003 at 9.30am and brought to the office of one ASP Lee for his statement to be recorded. The accused was again taken out of the lock-up on 1 July 2003 at 2pm to the magistrate's chambers for his confession to be recorded by the magistrate. The accused had also testified to the same effect.

D [59] So far as the lock-up diary and application forms are concerned, TW5 had explained in his evidence that they were not kept by him as they were not in his custody. Given this backdrop, it seems clear to me that there was no withholding or suppression of the lock-up diary. In any event, the defence was at liberty to apply to the court to subpoena lance corporal Hassan and SP3 Amran or the person having custody of the lock-up diary and the application forms to give evidence for the defence, but the defence had elected not to do so.

E [60] In the circumstances, I hold that s 114(g) does not apply and no adverse inference can be drawn against the prosecution.

F XI INDUCEMENT, THREAT OR PROMISE

[61] It was repeatedly argued for the defence that:

G (1) one chief inspector Mohd Izzuddin Runggai (TW6R) had kicked and assaulted the accused who was also allegedly tortured with lighted cigarette butts;

H (2) on 25 June 2003, the accused did not intimate to TW5 his intention to make the confession as TW5 has not recorded the accused's intention and the number of times the accused had been taken out of the lock-up, as required under s 119(i)(d) of the CPC;

(3) TW5 has only on 28 June 2003 at about 4pm informed the accused of the deceased's death which actually occurred 30 hours earlier ie 27 June 2003 at about 9am;

I (4) the accused was prepared to make the confession as he was frightened of being assaulted by the police and that TW5 had promised the accused of the release if the accused had made the confession;

- (5) until the confession was recorded, no one had informed him of the offence against him nor was he allowed to consult and be defended by a legal practitioner of his choice under art 5(3) of the Federal Constitution; **A**
- (6) TW5's failure to inform the court whether the magistrate who gave the order to remand the accused under s 117 of the CPC was the same magistrate who recorded the accused's confession; **B**
- (7) the accused testified that before he saw the magistrate, TW5 had given him special treatment in the form of nasi lemak with tea, nasi briyani with iced tea, cigarettes as well as watching TV whenever he saw TW5; **C**
- (8) as TW5 and the accused were known to each other, the accused had confidence in TW5 who had promised to release the accused and SP3 upon the accused making the confession; **D**
- (9) TW4 lance corporal Roslan said the normal travelling time from the Melaka Tengah police district headquarters to the Melaka magistrate's court was 30 to 45 minutes but on 1 July 2003, the journey took about an hour, for which there was no explanation; **E**
- (10) the accused testified that the rebuttal witness TW6R chief inspector Izzuddin bin Runggai was the officer who arrested the accused at 3.40am on 24 June 2003 and assaulted the accused while in the Melaka Tengah police district headquarters, while other unidentified police officers had used lighted cigarette butts to injure him; **F**
- (11) TW6R's failure to record the condition of the accused's body was in breach of the Inspector General's Standing Orders (IGSO); and **G**
- (12) The accused testified that from the lock-up, he was taken to a dark room where he saw other suspects were assaulted by means of rubber hose and stick and he was fearful of similar assaults. **H**
- [62]** For the prosecution it was submitted that the accused's allegation of assault on the one hand or special treatment on the other hand had been rebutted by the prosecution, and that the magistrate has made proper inquiry in order to satisfy herself that there was no inducement, threat or promise before recording the confession. **I**
- [63]** For brevity and convenience, a reference hereinafter to a paragraph shall be a reference to that paragraph in the defence contention herein.
- [64]** I shall first deal with paras 1, 4, 7, 8, 10 and 12 in relation to the accused's allegation of assault, fear of assault, special treatment and TW5's promise to release the accused upon the accused making the confession.
- [65]** To a great extent, I have already given my views in relation to the defence contention herein.

- A** [66] It is to be noted that the accused has not lodged any police report nor complained to the magistrate on 1 July 2003 in connection with the alleged assault, which the accused has raised for the first time in this trial within the trial. Having regard to the evidence of the magistrate (TW1), the investigating officer (TW5) and the rebuttal witness (TW6R) all of whom are in my view witnesses of truth, it is my specific finding that the prosecution has successfully rebutted the accused's allegations. I am therefore unable to sustain the defence contention contained in these paragraphs.

- C** [67] As regards para 2 ie TW5's failure to record in his diary the accused's intention to make the confession and the number of times the accused had been taken out of the lock-up, under s 119(i)(d) of the CPC, I shall reproduce the relevant portion of s 119(i)(d) as follows:

Section 119 Diary of proceedings in investigation

- D** (1) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth:
- (a) ...;
 - (b) ...;
 - (c) ...;
 - (d) statement of the circumstances ascertained through his investigation.

[68] In this respect, it is significant to read s 119(i)(d) together with s 119(ii) thereof, which where relevant, provides for the restrictive use of the diary, in the following words :

- F** (2) Notwithstanding anything contained in the Evidence Act 1950, an accused person shall not be entitled, either before or in the course of any inquiry or trial, to call for or inspect any such diary; and the Court shall at the request of such officer cause any other entries to be concealed from view or obliterated.

- G** [69] In the circumstances, even if TW5 had recorded the accused's intention in his investigation diary, the accused would not have the right to call for or inspect such diary. The failure to record the accused's intention does not in my view preclude TW5 from giving oral testimony that the accused had such an intention, and it is a question of credibility for me as the trial judge to determine whether or not to accept TW5's oral testimony.
- H** Having observed TW5's demeanour and the flow of his evidence, I have no reason to doubt his credibility. I therefore accept him as a witness of truth.

[70] Paragraph 11 has made reference to the IGSO but no such IGSO was produced by the defence. As such I am unable to determine the legal effect of the IGSO or any part thereof.

- I** [71] I am unable to see how the date and time of TW5 informing the accused of the deceased's death as contended in para 3 or the remand under

s 117 of the CPC in para 6 above could affect the presence or absence of any inducement, threat or promise in relation to the confession made by the accused.

[72] Article 5(3) of the Federal Constitution relied on by the defence in para 5 above confers upon the accused the right to be informed of the ground of arrest and be consulted by a counsel of his choice, but it is clear that such right exists at the time of his arrest. There was no submission that such failure has affected his voluntariness. In any event, as alluded to above, when the accused was brought before the magistrate, the magistrate had in the process of inquiry explained and informed the accused of the offence of murder under s 302 of the Penal Code and the consequence upon conviction. This has been cumulatively borne out in ID26 and the oral testimony of the magistrate.

[73] Finally, the time taken for the journey from the Melaka Tengah district police headquarters to the Melaka magistrate's court was made an issue in para 9. The estimation of time can never be achieved to the extent of military precision, especially in the light of traffic exigencies which occur ever so often. The range of time between 30 and 45 minutes and even about an hour appears to me to be within the permissible range of estimation for the said journey. In this connection, it is instructive to refer to the dictum of Raja Azlan Shah FJ (now HRH the Sultan of Perak) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris No 2* [1977] 1 MLJ 15 that in weighing the evidence of witnesses, human fallibility in observation, retention and recollection are often recognised by the court (see also *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63).

XII CONCLUSION

[74] Having anxiously considered the evidence adduced for the prosecution and the defence, on the foregoing grounds I am of the view that the prosecution has proved beyond reasonable doubt that the confession in ID26 has been made by the accused voluntarily, without any inducement, threat or promise. Hence, I hereby admit it as prosecution exhibit which is now marked as P26.

Confession made voluntarily, without any inducement, threat or promise.

Reported by John Paul Simon

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